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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1595
(Consolidated with Nos. 76-1471, 76-1521, 76-1604, 76-1624, and 76-1685)

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER NATIONAL ASSOCIATION OF BROADCASTERS

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This brief is submitted by petitioner National Association of Broadcasters ("NAB") in reply to the briefs filed in these consolidated cases by respondents Federal Communications Commission ("FCC"),

United States Department of Justice ("DOJ"), and National Citizens Committee for Broadcasting ("NCCB").

In its main brief,[1] NAB challenged the statutory authority of the FCC to adopt the regulation promulgated in Docket 18110 (NAB Br. 12-25) and challenged the constitutionality of the regulation under the First Amendment (NAB Br. 25-38). NAB's brief further took the position that, assuming the FCC had the statutory and constitutional authority to promulgate the rule, the Court of Appeals erred in holding that the FCC was required to order divestiture of all existing affiliated newspapers and broadcast stations (NAB Br. 38-57).

All three respondents' briefs support the Commission's statutory authority and the constitutionality of its regulation. NCCB and DOJ also attack the FCC's decision not to order universal divestiture, but only NCCB supports the Court of Appeals' decision in its entirety. DOJ, in contrast, contends that the Court of Appeals was correct in finding the FCC's decision not to order divestiture irrational, but takes the position that the Court erred in directing the Commission to adopt a divestiture rule.

This reply brief does not purport to respond to all the arguments made by the three respondents in their briefs. However, NAB believes that a response to some of the principal arguments raised would be helpful to the Court.

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[1] Brief for the Petitioner in No. 76-1595 (filed November 17, 1977).

I. THE REGULATIONS EXCEED THE FCC'S STATUTORY AUTHORITY.

Incredibly, in arguing in support of the FCC's statutory authority, none of the respondents' briefs even acknowledges that the Communications Act limits the FCC's authority to the regulation of "communication by wire and radio." 47 U.S.C. §§ 151, 152 (a) (1970). Instead, ignoring the statute, respondents note the FCC's authority to adopt regulations designed to promote diversity in the *broadcast* media by limiting the number of broadcast licenses that it will grant to a single applicant. (DOJ Br. 27-28; FCC Br. 21-22; NCCB Br. 16-17.) Then respondents leap quickly to the assertion that the Commission necessarily can do the same thing with respect to other communications media, including the press. It is this leap, however, that Congress has not empowered the FCC to make and that cannot be squared with the plain language of the Communications Act limiting the Commission's authority to the regulation of "communication by wire and radio."

The DOJ brief, for example, simply asserts that "[t]here can be no doubt" as to the Commission's authority and that it "follows directly" from the FCC's previous rules on multiple broadcast licenses. (DOJ Br. 28.) Such a conclusory assertion, with neither authority nor reason cited in support, cannot read out of the Act the "wire and radio" limitation that Congress wrote into it. The FCC's authority to expand its broadcast "diversity" rules to include newspapers no more "follows directly" from its broadcast rules than would an expansion of its broadcast "fairness" doctrine to include newspapers.

The FCC relies primarily upon *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) as the source for its asserted newspaper regulatory authority.[2] Its brief asserts that in *Storer*, "this Court upheld a portion of the FCC's multiple ownership rules as consistent with the Commission's authority to announce by rule 'its attitude on public protection against [concentration].' " (FCC Br. 21, *quoting* 351 U.S. at 203.) Significantly, the FCC's quotation chooses to insert the single bracketed word "concentration" in place of the actual words used by the Court, namely "*such* concentration." 351 U.S. at 203 (emphasis added). The significance of the words "*such* concentration" is that they follow immediately after the Court's statements that the Communications Act permits regulation "to assure fair opportunity for open competition in the use of *broadcasting facilities*" and that the FCC's multiple ownership rule reflected an "intent to limit *the number of stations* consistent with a permissible 'concentration of control.' " *Id.* (emphasis added). Earlier, the Court had made abundantly clear that the "purpose of the limitations is to avoid overconcentration *of broadcasting facilities.*" *Id.* at 193 (emphasis added). The FCC should not be permitted to convert this Court's validation of its regulations against concentration in broadcasting into a broad authority to act against what it may perceive to be "concentration" in fields other than "communication by wire and radio."

Most telling of the basic gap in the respondents' argument is NCCB's reliance on *Midwest Video* and

[2] *Storer* was also heavily relied upon by the Court of Appeals below. *See* NAB Br. 23-25.

Southwestern Cable.[3] NCCB asserts that those cases uphold "the Commission's authority to regulate communications media ancillary to its authority over broadcasting even absent express provision in the Act." (NCCB Br. 17.) However, the "communications media" at issue in both *Midwest Video* and *Southwestern Cable* were cable television systems. This Court made clear in both cases that under the Communications Act the FCC's authority is limited to the regulation of "communication by wire and radio" and that cable television could be regulated only because it was such a form of communication. 406 U.S. at 659-60; 392 U.S. at 167-68. Unless NCCB now claims that newspaper publication is also "communication by wire and radio," the cable television cases cannot support the FCC's authority here. To the contrary, those cases point in the opposite direction, and NCCB's reliance on them vividly illustrates the flaw in its argument.

Respondents do not attempt to controvert—and the regulation and record here do not permit them to controvert—NAB's description of the purpose, effect and rationale of the FCC's order. (NAB Br. 13-15.) As that description makes clear, the order is nothing less than an attempt by the FCC to restructure the mass communications media, broadcast and print alike, in accordance with its policies. This attempted restructuring is not intended to have and cannot have any effect on diversity in *broadcasting*, nor is it premised upon any finding of a detrimental effect on *broadcasting* performance resulting from common ownership.

[3] United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

Far from disputing NAB's brief in this respect, DOJ itself finds the order to be based upon a policy of "diverse ownership of the media of communications in general." (DOJ Br. 28.) At least if there were no First Amendment, Congress might have created a federal agency to regulate, in DOJ's words, "the media of communications in general." Such an agency might well have found to its liking a cross-media, one-to-a-market rule such as the one here. However, under the Communications Act the FCC is not that agency and it cannot lawfuly act as if it were. Respondents totally fail to come to grips with that basic fact.

With respect to Congress' confirmation that the FCC lacks the authority to promulgate its anti-newspaper rule (NAB Br. 19-20), respondents attempt to sidestep the point. The FCC and DOJ assert that Congress' statements are inapplicable to an FCC order that "merely" bars from holding broadcast licenses anyone who publishes a newspaper "within the same community." (FCC Br. 24; DOJ Br. 29.) That assertion, however, cannot stand in light of the comprehensive language used by Congress in denying that the FCC has the power to "promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper."[4] Moreover, if the Act indeed gives the Commission authority to sweep across all forms of communications media so as to support a "local" newspaper ban, it would equally authorize a "national" ban should the Commission choose to impose one.

[4] Conference Rep. No. 2426, 82d Cong., 2d Sess. 15 (1952). *See* NAB Br. 19-20.

NCCB clings to *United States* v. *Wise*, 370 U.S. 405 (1962) (NCCB Br. 19), but fails even to attempt to show the applicability of that case here. (*See* NAB Br. 22-23.) Ironically, NCCB then attempts to rely on Congress' recent consideration of further amendments—a reliance that is precisely the kind foreclosed by *Wise*. (NCCB Br. 19-21.) As NCCB notes, the amendments under discussion in 1974 died without any resulting legislation or other action by the full Congress. Although there are passing references to the FCC's authority to promulgate a rule in Docket 18110, the failure of Congress to act is unexplained. The failure to act might well reflect the view of the full Congress that no such power is conferred by the Act, or any number of other possible explanations. *Wise* makes clear that such an ambiguous nonaction that gives rise to "several equally tenable inferences" can provide no support for a valid inference as to the intent of Congress. 370 U.S. at 411.[5]

The frailty of the legislative support claimed by NCCB is apparent when compared to the clear and direct action taken by Congress in connection with the 1952 amendments to the Act. As noted in NAB's brief (at 19-20), Congress there (1) undertook a broad review of the Act, (2) held hearings and fully considered a specific proposed provision that would have prohibited the FCC from promulgating any rule treating persons discriminatorily on the basis of their newspaper affiliation, (3) omitted the proposed pro-

[5] Interestingly, DOJ does not rely on the 1974 discussions. Instead, it observes in its brief that "subsequent legislative history is not helpful unless it culminates in legislation clearly demonstrating the view of Congress as a whole about the prior statute." (DOJ Br. 29 n.22.)

vision with the express explanation that it was omitted solely because it was unnecessary since the FCC had no such authority under the existing Act, and (4) proceeded to enact the bill reported by the Conference Committee in light of its explanation of the reasons for the omission.

NAB believes that the Communications Act itself leaves no real doubt that the FCC has stepped beyond the bounds of its statutory authority in its effort to regulate the mass communications media generally. But were there any doubt from the words of the Act, the action of Congress in connection with the 1952 amendments—as well as the FCC's own construction of its authority and its representations to Congress (see NAB Br. 16-19)—must remove it.*

II. THE REGULATIONS CURTAIL THE FIRST AMENDMENT RIGHTS OF BROADCASTERS TO PUBLISH NEWSPAPERS.

NAB contended in its main brief (at 25-37) that the government may not constitutionally condition the grant of a broadcast license upon a forfeiture of the licensee's First Amendment right to publish a local newspaper. In support of such a forfeiture, respondents advance the following: (1) there is no First Amendment right to a broadcast license; (2) any forfeiture of press freedoms which the FCC determines to be in "the public interest" is necessarily

* None of the respondents' briefs even mentions the controlling rules of statutory construction long recognized by this Court. *E.g.*, Chemehuevi Tribe v. FPC, 420 U.S. 395 (1975); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933) (see NAB Br. 21-22). The reason is simply that under those rules, the regulation adopted by the FCC in Docket 18110 is demonstrably beyond the power conferred on the agency by the Communications Act.

constitutional; (3) the forfeiture simply applies the FCC's constitutionally approved multiple ownership rules and Fairness Doctrine to newspapers; (4) just as newspapers are subject to the antitrust laws, so also are they subject to governmental regulation designed to establish diversity of opinion in the mass media; (5) a regulation prohibiting any broadcaster from publishing a local newspaper, and prohibiting any newspaper publisher from acquiring a broadcast license does not chill speech; (6) freedom of the press is not unconstitutionally abridged so long as it is only abridged locally; and (7) the abridgement is in any event constitutional because it does not affect the contents of newspapers. (DOJ Br. 21-25; FCC Br. 26-31; NCCB Br. 21-23.)

Manifestly, "[t]here is never a paucity of arguments in favor of limiting the freedom of the press." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 144 (1973) (Stewart, J., concurring). However, none of the respondents' arguments justify the limitation in this case.

Respondents presume to dispose of the constitutional issue by arguing that there is no First Amendment right to a broadcast license, citing *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). But the constitutional issue in this case has nothing to do with any asserted "right" to broadcast, and no petitioner has claimed to possess such a right. The First Amendment right at stake in this case is the right to publish a newspaper; the issue presented is whether the government may indirectly abridge that right through conditions it has placed upon the granting of a particular governmental privilege or benefit.

Here, because that privilege or benefit happens to be a broadcast license, which, like newspaper publication, entails public expression of ideas, respondents hope to have the Court focus on the license rather than the newspaper as the object of the First Amendment claim.

The attempted deflection would have been more apparent, of course, had the conditioned benefit not partaken of any form of speech at all. For example, had the government conditioned its granting of either a tax exemption, or unemployment compensation, or employment to a school teacher upon the respective grantees' forfeiting their right to publish a local newspaper, it would have been clear that the forfeitures violate the First Amendment. *Speiser* v. *Randall,* 357 U.S. 513 (1958); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). These violations obviously would not depend on the taxpayer having a First Amendment right to the exemption, the unemployed party a "right" to compensation, or the school teacher a constitutional claim to a job. Rather, the issue in such cases would turn on the fact that a governmental benefit—be it a tax exemption, a teaching job, or a broadcast license—was granted at the expense of the applicant's right to publish a local newspaper:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. [*Perry* v. *Sindermann, supra,* 408 U.S. at 597.]

Thus, the real question for review is whether a governmental benefit, whatever its nature, may be denied on the ground that the applicant chose to publish a local newspaper.

The FCC says (at 26-27) that it may take such an action so long as the denial is "in the public interest." Since the agency surely does not mean that its actions are exempt from constitutional scrutiny, the suggestion is apparently that whatever is determined to be "in the public interest" would perforce accord with the First Amendment. Even if this were so, it would necessarily beg the ultimate First Amendment question presented in this case. "[T]he First Amendment and the public interest standard of the statute are not coextensive. The two are related in the sense that the Commission could not 'in the public interest' place a requirement on broadcasters that constituted a violation of their First Amendment rights." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 142 (Stewart, J., concurring).

On the merits of that ultimate First Amendment question, respondents take the view that for consti-

tutional purposes broadcasting and newspaper publishing are identical and that governmental regulation which is valid as to the former is likewise valid when extended to the latter. This Court has plainly ruled to the contrary. *Red Lion* itself, so much the centerpiece of respondents' arguments, makes this clear:

> *Red Lion* "makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case," by demonstrating that "'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 101 (1973), quoting *Red Lion Broadcasting Co., supra,* at 388. [*Buckley* v. *Valeo,* 424 U.S. 1, 50 n.55 (1976).]

Thus, when in *Buckley* it was argued that governmental restraints on broadcast speech could be similarly imposed on nonbroadcast speech, this Court declared:

> *Red Lion* therefore undercuts appellees' claim that § 608(e)(1)'s limitations [upon individual expenditures for political candidates] may permissibly restrict the First Amendment rights of individuals in this "traditional free speech case." [*Id.*]

The "right of every individual to . . . publish"—a right which the First Amendment nowhere withholds from broadcasters and would-be broadcasters—has been jeopardized here as it was jeopardized in *Buckley*. There is simply no authority for respondents' contention that the FCC's multiple ownership rules and Fairness Doctrine can be constitutionally extended to the "traditional free speech" of

newspaper publishers. *Buckley* v. *Valeo, supra; Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974).

Neither do respondents offer any authority or reasoned analysis for their proposition that since newspapers are subject to antitrust laws, they are therefore also subject to the government's diversity-in-the-mass-media program now before this Court. Thus, NCCB contends (at 22) that while the program "does not allow one making that choice [to publish a newspaper] to retain a broadcast license in the same locality, this is consistent with long-standing prohibitions against monopolization of the press (*Associated Press* v. *United States, supra,* n.3, 326 U.S. at 20) . . . ." Similarly, the FCC argues that "[n]ewspaper publishers . . . are not excused from the reach of valid regulatory policies, including the Commission's diversification policy. *See Associated Press* v. *NLRB,* 301 U.S. 103, 122-32 (1937); *Associated Press* v. *United States, supra,* 326 U.S. 1." (FCC Br. 28 (footnote omitted).) Finally, according to DOJ (at 23), "[i]f Congress constitutionally may prohibit the owner of one newspaper from acquiring another [where the acquisition would violate the antitrust laws], then it, and the Commission acting under its authority, constitutionally may prohibit the owner of one newspaper from acquiring a broadcast station . . . ."

What respondents never explain is the nexus they see between, on the one hand, antitrust laws made applicable to newspapers and other businesses alike and, on the other, the present diversity regulation made applicable to newspapers alone. The former laws,

according to the *Associated Press* cases upon which respondents rely, may be constitutionally applied to newspapers because they are designed solely to prohibit anticompetitive marketplace abuses having no relation whatever to newspaper expression. But the latter regulation is directed at newspapers only. It is specifically designed to curtail expression in the print media which the government believes should not be heard from a speaker who might also express his view over the air. It is not premised on any finding, either actual or potential, of monopoly, anticompetitive conduct, or license abuse. Rather, it applies to every mass media market, irrespective of the number of newspapers, broadcasters, or other speakers in the market, and regardless of the competitive nature of the market. Indeed, even were a broadcaster to establish a new newspaper to add to the media in a community, that action would cause the forfeiture of his broadcast license. Such a law, the antithesis of that presented in the *Associated Press* cases, is unconstitutional.

Turning finally to the specifics of the constitutional issue which NAB submits must be reached in this case, DOJ fairly recapitulates the matter as follows:

> The gist of [petitioners'] argument is that the government may not impose a burden (inability to own a broadcast station) on someone just because he engages in protected speech as the owner of a newspaper. To deprive newspaper owners of the ability to own broadcast stations, they say, would be to penalize pure speech. [DOJ Br. 21.]

To this, respondents have offered three answers.

First, in DOJ's view:

> The rule prohibiting co-located newspaper-broadcast combinations does not chill or control speech. It simply determines who, among many otherwise eligible applicants, shall not be entitled to operate a particular broadcast station. [*Id.* at 23-24.]

To us, this borders on the disingenuous. The rule challenged here flatly prohibits any broadcast licensee from expressing his views by publishing a local newspaper; it also admonishes all those who do choose to publish local newspapers that they will, as a consequence, be summarily excluded from any consideration for a broadcast license. To say that such a rule "does not chill or control speech" but "simply determines who . . . shall not be entitled to operate a particular broadcast station" blinks reality.

On such reasoning, furthermore, there is not a single unconstitutional condition which could not survive attack. Thus, the unconstitutional loyalty-oath condition struck down in *Speiser* v. *Randall, supra,* should have been upheld on the ground that it was simply a means of determining who should not be entitled to a tax exemption. By the same token, the refusal of unemployment benefits to a Seventh Day Adventist who failed to work on Saturdays should have been validated in *Sherbert* v. *Verner, supra,* as merely one criterion for assessing payment eligibility. Likewise, *Perry* v. *Sindermann, supra,* should have approved the dismissal of a teacher voicing public criticism of his college administration, viewing it as a method for selecting from competing job applicants. DOJ's position on this point is untenable.

Next, DOJ contends (at 21-22) that petitioners have exaggerated the abridgement of their right of free ex-

pression since the government ban is only as to *local* publication of newspapers; those under the ban have only to take their views to another community in order to regain the right to express themselves. For First Amendment purposes, the asserted distinction is meaningless. If the government may limit a newspaper's circulation, it may prohibit its publication altogether. A First Amendment that cannot check a ban on local publication will be powerless to negate it once it has spread nationwide. *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244-45 (1936); *cf. Abood* v. *Detroit Board of Education,* 431 U.S. 209, 234 n.31 (1977).

Finally, all the respondents reason that since the government-exacted forfeiture of newspaper-publishing rights is not based on the content of the newspapers, the forfeiture therefore survives the strict scrutiny mandated in this case. (DOJ Br. 21 n.15, 24 n.18; FCC Br. 29 n.56; NCCB Br. 22 n.28, 23.) Both the premise and the conclusion are altogether unsound.

It is a strange construction of the First Amendment which supposes it to invalidate a diversity rule requiring newspapers to adopt a Fairness Doctrine, *Miami Herald Publishing Co.* v. *Tornillo, supra,* but to uphold a diversity rule requiring those same newspapers to cease publication altogether. Surely it is not being seriously contended that although government may not censor publications, it may nevertheless ban them outright.

Furthermore, by labeling this case as being in a "content neutral" category, and asserting that cases such as *Tornillo* and *Grosjean* are in a "content partial" category, respondents have done no more than create a false issue and useless classifications. Both

categories, at least as respondents have defined them, involve unconstitutional penalizing of free expression.

If anything, it is the First Amendment violations in *Tornillo* and *Grosjean* that were "content neutral," while it is this case which presents the deliberate governmental effort to regulate newspapers based on the views expressed therein. In *Tornillo,* the unconstitutional right-of-reply law actually took no regard for the content of any issues discussed in newspapers; nor was it concerned with the side any newspaper took on any issue. It required only that both sides of such issues be aired. *Grosjean* was even more "content neutral," at least in the manner respondents use the term. There, all newspapers above a certain circulation level were subjected to a particular tax, irrespective of their views or contents. This Court's condemnation of the tax was nevertheless unequivocal.

The basis for the cross-ownership ban in this case, whether well-founded or not, is that he who speaks through the broadcast medium would repeat himself if he also spoke through a newspaper; hence, for the sake of its vision of diversity, the government has decided to prevent the speaker from saying the same thing in both media. Quite simply, the government is prohibiting or penalizing newspaper publication because it supposes that the contents thereof would be similar to what might be aired by the publisher on his station, and because it believes those views should not receive such concentrated dissemination. What is that if not content control? Why is the government suppressing such speech if not because it believes that the particular speaker's views have been heard too much? How

can such suppression be found constitutional consistent with *Buckley* v. *Valeo, supra*?

The FCC puts it that "[p]etitioners simply cannot claim a wholesale exemption from the Commission's rules merely because they engage in publishing." (FCC Br. 29.) We submit that it is the other way around. Petitioners cannot constitutionally be subjected to wholesale exclusion from Commission licensing consideration merely because they engage in publishing. That is the exclusion accomplished by these rules. We urge this Court to set them aside.

III. THE ARGUMENT FOR DIVESTITURE IS PURELY THEORETICAL AND DISREGARDS BOTH THE BURDEN OF PROOF AND THE EVIDENCE.

A. The FCC Was Not Required To Order Divestiture On The Basis Of An Inconclusive Record.

The NCCB and DOJ arguments about divestiture rest mainly upon lengthy and repeated assertions of the importance of diversity and competition to the public interest. But this argument is irrelevant to the questions before this Court. There is no issue here regarding the importance of diversity and competition. Those can be conceded to be laudable objectives as well as elements to be weighed in assessing the public interest. Rather, the issues are: (1) whether there was any evidence before the Commission showing the need for new rules on this subject at all; (2) whether the Commission could rationally conclude that rules requiring divestiture of all present newspaper-affiliated broadcast stations required the weighing of different factors than rules merely prohibiting any future newspaper-broadcast affiliation; and (3) whether the Commission could rationally conclude that the proposed divestiture rules would result in undue harm to other

legitimate regulatory objectives, such as encouraging high quality programming by broadcast licensees, and that such harm outweighed any assumed advantages of the rules.

The NCCB and DOJ arguments on these issues simply assume the answer to the crucial policy question underlying the FCC's rulemaking proceeding. They disregard all record evidence that the goals of diversity and competition would not be significantly enhanced by the proposed order or that any benefits achieved might be offset by the harm caused by ordering sweeping divestiture. Thus, by relying on a profession of faith in divestiture and an unbalanced characterization of harm likely to be caused by a broad divestiture order, NCCB and DOJ seek to persuade this Court that the FCC has exercised its discretion in an arbitrary and capricious manner.

The NCCB and DOJ briefs present merely a caricature of the FCC's process of weighing the record before it in Docket 18110. To its credit, the FCC in its opinion below recognized that a tentative assumption—which is by no means as self-evident as NCCB and DOJ assume—is involved in any proposed rule precluding affiliation of newspaper and broadcast stations. This assumption is that separation of media ownership will result in benefits significant enough in terms of increased diversity to justify a massive restructuring of the industry.

Most of the massive record accumulated by the FCC deals with this issue and ancillary questions such as the present extent of competition and diversity in broadcast markets, the existence of any empirical evidence linking affiliation with inadequate performance

by broadcast stations or anticompetitive abuses, the extent of harm likely to be caused by divestiture, and the availability of means less drastic and disruptive for achieving sought objectives.

The FCC's Second Report and Order not only reviews such evidence in great detail but implicitly recognizes the degree of uncertainty that surrounds the assumption underlying the proposed rule. It noted that "[o]ur examination of the situation leads us to conclude that we may have given too little weight to the consequences which could be expected to attend a focus *on the abstract goal alone.*" 50 F.C.C.2d at 1078 (emphasis supplied) (JA. 197). The FCC went on to asert that "[w]e have concluded that *a mere hoped for gain* in diversity is not enough." *Id.* (emphasis supplied) (JA. 198). The hypothetical and speculative character of benefits of divestiture, altogether ignored by NCCB and DOJ, thus loomed significant to the FCC as it weighed possible detrimental consequences of its orders. The result of the Commission's deliberations was its conclusion that the assumption behind a prohibition on cross-ownership, while sufficient to justify a prospective rule, was not sufficient to warrant a massive restructuring of the industry through wide-scale divestiture. The question here is whether the Commission's sensitive treatment of this issue was irrational.

A curious aspect of this case is that the Court of Appeals, NCCB and DOJ all seem to think that if the evidence is "inconclusive," that supports an order of divestiture. This is erroneous and contrary to the position the Court and DOJ have previously taken.

It is elementary that the proponents of a rule carry the burden of proof for that rule. *See* Administrative

Procedure Act § 7(c), 5 U.S.C. § 556(d) (1970). Thus, if there is an absence of evidence, or if the evidence is so evenly balanced that it indicates no result, then there is no basis for the adoption of the proposed rule. This principle has been well stated by DOJ in its brief (at 22) to the Court of Appeals in *Home Box Office, Inc.* v. *FCC,* No. 75-1280 (D.C. Cir. Mar. 25, 1977), *cert. denied,* 98 S.Ct. 111 (1977), where it said:

> Every rule must stand or fall on the basis of its own reasonableness, as tested by evidentiary support in the record at the time when the rule is issued.

The Court of Appeals took the same position in that case in setting aside an FCC rule, stating:

> [T]he issue of the reasonableness of the balance struck between regulatory and competitive goals, where these diverge, is a matter to be tested on the basis of material in the rulemaking record .... [Slip op. at 64.]

The argument here is epitomized by the DOJ brief which says (at 32) that: "As there is no proof that concentration of ownership harms anyone, so there is no conclusive empirical proof that allowing cross-ownership serves the 'public interest'. . . ." The brief goes even further (at 34) to the remarkable conclusion that: "[H]yperbole is the basis of . . . the prospective rules at issue in this case." It should go without saying that lack of evidence and hyperbole are not an adequate basis for a regulation which will have drastic, far-reaching and irreversible consequences.

NCCB and DOJ cite no authority for the proposition that the burden of proof was on the opponents of di-

vestiture. The reasoning by which they arrive at such an unsupportable position appears to be as follows:[7] (1) The grandfather provision constituted a departure from existing Commission principles and precedent; (2) the Commission could justify such a departure only by finding the weight of the evidence in support of grandfathering; (3) the arguments given in support of grandfathering were insubstantial and arbitrary, and did not meet the required burden of proof; and (4) therefore, the grandfather provision must be overturned.

The basic flaw in this reasoning is its faulty premise. Contrary to the contentions of NCCB and DOJ, it is wide-scale divestiture, not grandfathering, which would have constituted a departure from existing precedent. Under existing precedent there was no prohibition on newspaper-broadcast affiliation, and renewal applications of newspaper-affiliated broadcast stations were always judged on the basis of the broadcast record of such affiliated stations. *See Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966) ("[I]n a renewal proceeding past performance is [the Commission's] best criterion . . . ."). Furthermore, under applicable precedent the Commission had regularly avoided ordering substantial divestiture when adopting or modifying its multiple ownership rules. See cases cited in NAB Br. 43 n.19. In refusing to deviate from these precedents, the Commission held that "the idea of divestiture . . . requires a demonstration of more than just theory or a resting on narrowly drawn balances." 50 F.C.C.2d at 1074 (JA. 188-89). Thus, if precedent is to

[7] *See* DOJ Br. 35-51; NCCB Br. 27-45.

control, with the record as inconclusive as DOJ acknowledges it to be, the Commission clearly had the discretion, if not the obligation, to refuse to deviate from precedent by ordering universal divestiture.

The NCCB/DOJ analysis of the harms of divestiture is similarly flawed. It consists of setting up and knocking down straw men. Contrary to respondents' assertions,[8] Commission findings and actions in individual comparative licensing proceedings and voluntary license assignment proceedings do not undercut the reasonableness of the Commission's concern for potential harms which might derive from universal, mandatory divestiture. That each of those harms might not exist in all possible cases does not mean that the Commission was arbitrary in relying on them.

This faulty analysis was equally reflected in the central holding of the Court of Appeals, which respondents defend, that "the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." 555 F.2d at 962 (JA. 415-16). This holding, however, misstates the FCC's ruling.

The FCC's decision to require some evidence of either harm of concentration, or the benefits of divestiture, was not based on any perception that the agency was "required" to do so, nor did it stem solely from the three countervailing values of local ownership, continuity, and avoidance of economic disclocations. Instead, the requirement was simply a function of the agency's judgment that the case for universal divestiture had not been made, a judgment which took into

[8] *See, e.g.*, DOJ Br. 42-43; NCCB Br. 33, 44.

account the absence of any evidence supporting divestiture, the three countervailing values, and other competing policy considerations such as the presumption against retroactive rules. *See* 50 F.C.C.2d at 1047 (JA. 137).

As the Court of Appeals recognized, but failed adequately to consider, the FCC's decision was thus based "primarily on policy," 555 F.2d at 957 (JA. 396). The basic principle that courts should defer to agency expertise thus applies here with special force, since the very purpose behind Congress' creation of specialized administrative agencies was to delegate to the agencies the power to balance and resolve conflicting interests by utilizing their accumulated expertise. *See NLRB* v. *Truck Drivers Local 449,* 353 U.S. 87, 96 (1957). As this Court commented in upholding such a balance of interests struck by the ICC:

> [The ICC has been granted the] power to weigh the competing interests and arrive at a balance that is deemed "the public convenience and necessity." . . . If the Commission has "drawn out and crystallized these competing interests [and] attempted to judge them . . ., we can require no more." [*Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 293-94 (1974).]

Similarly, in the instant case the FCC has identified the competing policy interests, and has determined that tangible proof of the benefits of diversity was required to warrant divestiture. The Court of Appeals should have deferred to this policy judgment of the agency. *Cf. Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 122-23 (1973) (noting that the Court of Appeals had "failed to give due weight" to the FCC's "judgment on [policy] matters"); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203 (1956) (observing that Congress has placed "regulation of businesses like communication in specialized agencies").

Moreover, the Commission's judgment was based in part on its evaluation of complex factual questions about which there were no reliable data, such as the extent to which divestiture would produce diversity or disrupt continuity. *See* 50 F.C.C.2d at 1062-63, 1078 (JA. 166-68, 196-98). Despite the FCC's superior expertise and experience in these matters, the Court of Appeals overruled the agency's judgments, commenting, for example, that in its opinion, a "one time alteration in the ownership structure of the broadcast industry should not effect the public's interest in quality programming. . . ." 555 F.2d at 964 (JA. 422). The lower court has thus ignored the principle that "[t]his type of judgment, involving the balancing of interrelated . . . factors, is peculiarly within the scope of the expertise with which [a specialzed agency] is presumptively endowed." *Plumbers Local 519* v. *Construction Industry Stabilization Comm.,* 479 F.2d 1052, 1056 (Temp. Emer. Ct. App. 1973); *Carpenters 46 County Conference Bd.* v. *Construction Industry Stabilization Comm.,* 393 F. Supp. 480, 489 (N.D. Cal. 1975).

Basically, the Court of Appeals, NCCB and DOJ simply disagree with the Commission's assessment of the weight to be accorded the countervailing factors, all of which can affect the quality of operations of the Commission's broadcast licensees. But it is not the role of a reviewing court to substitute its judgment, or the judgment of an intervening party, for that of the agency to which Congress has delegated regulatory responsibility. The factors which the Commission con-

sidered were clearly within its expertise, and its decision presented a rational explanation of its reasoning. Nothing more was required.

B. The Record Was Not Inconclusive Insofar As It Showed A Plethora Of Media Voices In Most Areas And A Continuing Trend Toward Deconcentration.

Even were the evidence "inconclusive" in the sense of being evenly balanced—which is not asserted and which we believe is not the case—that would not warrant the issuance of a rule requiring large-scale divestiture on the basis of surmise, speculation and theory, as NCCB and DOJ seek here. *A fortiori,* the Commission was not required to order such divestiture on the basis of a record which persuasively demonstrated the absence of need for such a rule.[9]

As noted above, both the Court of Appeals and its principal proponents here, NCCB and DOJ, frankly confess that there is no evidentiary support for the result they desire and accordingly rest their arguments entirely upon wholly hypothetical and speculative assumptions and theories. On the other hand, there was substantial evidence in the record that most of the assumptions and arguments on which NCCB and DOJ rely are either unwarranted or contrary to fact. Their blithe statements about increasing diversity by requiring blanket divestiture are not merely unsupported, but are controverted by the record.

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[9] The following analysis of the record is, of course, not intended to convince this Court that the grandfather provision must have been adopted by the FCC. Rather, the discussion is intended to demonstrate that the Commission acted in a reasonable and rational manner in rejecting the proposal for wide-scale divestiture.

Numerous studies were submitted to the FCC demonstrating that there is no greater correspondence of viewpoints and treatment of subject matter between commonly owned broadcast stations and newspapers than between separately owned stations and newspapers.[10]

The FCC was also presented with and took note of evidence that newspapers and broadcast stations are not "like media" offering substantially the same service to the public as are, for example, two radio stations in the same market. 50 F.C.C.2d at 1065-66 (JA. 172-74). These differences in the characteristics of the two media guarantee an inherent diversity in the presentation of information and viewpoints to the public. For example, as the FCC noted, broadcast news often deals with headlines, whereas newspapers offer analysis and background. *Id.* at 1065 (JA. 172). Broadcast facilities only partially act as a conveyer of news and are primarily entertainment media. By contrast, most nonadvertising space of newspapers is devoted to news. *Id.* at 1065-66 (JA. 172).

The FCC was further aware that, unlike its other affiliation rules, a rule requiring divestiture would not increase the number of separately owned broadcast stations in a market. Moreover, the FCC was presented with no evidence or argument that prohibiting affiliation would increase the diversity of views available

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[10] *See, e.g.,* Anderson, *Broadcast Stations and Newspapers: The Problem of Informational Control: A Content Analysis of Local News Presentations* (1971) (NAB Exhibit E) (JA. 593); McDougald & Sasser, *Atlanta News & Editorial Research Study;* Anderson & McDaniel, *Two Studies: A Historical Analysis and Content Comparison of Cox Broadcasting Corporation's Affiliated News Media, Dayton, Ohio.*

from broadcast media subject to FCC regulation. The absence of immediate, tangible or demonstrable benefits in the broadcast industry was thus another factor properly taken into account by the FCC in determining whether to order widespread divestiture.

The NCCB and DOJ briefs read like conventional antitrust briefs in merger cases—talking about the evils of concentration and the virtues of deconcentration. But these arguments are completely inappropriate here, because the record failed to provide any factual basis for them. The FCC was presented with no evidence that divestiture was necessary to alleviate any scarcity of diverse sources of opinion and information or would significantly increase the diversity of viewpoints available to the public. NAB Br. 49-51. The Commission was fully aware of this abundance of talk and absence of evidence. 50 F.C.C.2d at 1080 n.29 (JA. 201).

On the other hand, there was in the record detailed, extensive and uncontradicted evidence of the number and kind of media voices in every broadcasting market in the United States.[11] This was, so far as we are aware, the first complete media census of the country that had ever been made. NAB submitted exhibits showing, by name and other details, every television station, radio station, newspaper and magazine published or circu-

[11] M.H. Seiden & Assocs., *Mass Communications in the United States—1970* (NAB Exhibits A-1 through A-4). While the Commission considered this study unrealistic in giving too much weight to minor media from outside the market (*see* 50 F.C.C.2d at 1079 n.28, JA. 200), it would have been equally unrealistic to disregard media other than co-located broadcast stations and newspapers in assessing the need for a broad divestiture order.

lating in every U.S. media market.[12] This evidence showed that there is a plethora of media voices—no matter how counted—in every American media market.

For example, in the largest market, New York City, there are available to the residents at least 610 media, owned by a total of 434 different owners. Of the 610, 519 originate in the market and these are owned by 372 different owners. (JA. 649.) While the figures understandably tend to be lower in smaller markets, the following table demonstrates that the average number of media both in the market and originating in the market, as well as the average number of owners of those media, is numerous for all markets:

Average Number of Media and Owners

	Total number in market		Number originating in market	
	Media	Owners	Media	Owners
Markets 1-50:	217	170	139	111
Markets 51-100:	161	130	80	68
Markets 101-150:	116	95	47	41
Markets 151-204:	76	63	21	18

[JA. 650]

This evidence was certainly more persuasive than the hortatory rhetoric of NCCB and DOJ. The suggestion that there is a concentration of control, or a trend toward concentration or lessening of numbers in either

[12] The census is summarized in the Appendix at 466-592.

broadcasting or journalism is simply not accurate. As the respected reporter James Reston has aptly noted:

> Actually, with the rise of television and radio broadcasting stations, the sources of information in the United States have dramatically increased in recent decades, breaking the monopoly of the printing press.
>
> • • •
>
> Out of this vast network of stations and newspapers now pours out night and day the greatest flow of information and the loudest clash of divergent opinion ever inflicted on a long-suffering people in the history of the written and spoken word. [N.Y. Times, Nov. 21, 1969, at 46 (JA. 654).]

The only response by proponents of divestiture to this record evidence of media diversity was the argument that not all of the media listed for each market are major media, and that some media are read, watched or listened to by more people than others. No doubt this is true. However, the First Amendment does not guarantee anyone an audience, it merely guarantees the right to speak. The number of media voices does show the tremendous range of diversity in the media markets. The audience attracted by the several voices is a matter that cannot be controlled by government under our Constitution. Many critics bemoan the fact that masses of people spend much time watching frivolous comedies or violent drama on television while more educational and cultural shows are much less popular. Whatever the facts may be with respect to that aspect of broadcasting, it is not the function of government to guarantee an audience. The data demonstrate beyond doubt that there is a diversity of media voices available in all media markets.

Furthermore, other undisputed evidence in the record showed that if concentration is taken to mean affiliation between broadcasters and newspapers—which is the apparent meaning in the NCCB and DOJ briefs—that concentration has been steadily decreasing over the years and has reached the lowest point that has existed since the advent of television.

The Udell study [13] revealed that newspaper-affiliated television stations have declined from 29% of all television stations in 1955 to 14% in 1969. Moreover, newspaper control of, or affiliation with, broadcast outlets continued a sharp decline. By 1970, only 4% of broadcast stations were affiliated with newspapers and only 3% of the broadcasters in the top 100 markets were publishers or affiliated with publishers.[14] By 1970, the percentage of all broadcasters with newspaper affiliations was lower than in any year since broadcasting began in 1922.[15]

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[13] Udell, *Economic Consequences of FCC Proposal and Critique of Relevant Literature*, submitted by the ANPA.

[14] See NAB Revised Ex. C (JA. 870).

[15] *Id.* Not only had there been a decrease in affiliation but there had concurrently been an increase in both the number of media outlets and the number represented by separate owners. This was true whether one examined the top 10 markets, the top 25, the top 50, or the top 100. Indeed, it appeared that increases had been greatest in the smaller markets of the top 100. During the period from the beginning of broadcasting in 1922 through 1970, the total number of media outlets and of media voices (*i.e.*, separate media owners) increased faster than the population, so that there were more media outlets per 1,000 of the population in 1970 than in any prior year, as well as more separate voices (JA. 871). The number of broadcasting outlets in the top 100 markets grew over 10 times (1,062%) from 1922 to 1970 and the number of broadcast voices increased by 713% (JA. 868). Sterling, *Ownership Characteristics of Broadcast-*

Analysis of the data presented by NAB in its revised Exhibit F showed that the trend away from cross-media affiliation continued until the FCC closed the record in Docket 18110 prior to oral argument.[16] The NAB data relating to transfer applications were even more dramatic in showing the trend away from multi-media affiliation in single markets.[17] Thus, the evidence before the FCC clearly showed that market forces were causing substantial diversification of the media, and that a broad divestiture rule was not necessary to promote diversity.

CONCLUSION

For the reasons outlined herein, and in its main brief, NAB respectfully requests this Court to hold that

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ing Stations and Newspapers in the Top 100 Markets, 1922-1967 (NAB Exhibit C) (JA. 659), as amended by the Supplement to NAB Exhibit C Regarding Cross-Ownership of Broadcasting Stations and Newspapers (NAB Revised Exhibit C) (JA. 866).

[16] Out of a total of 654 applications for new station licenses, only 3 were by newspaper-affiliated applicants, and in each of these cases the applicant had an AM license and was seeking a companion FM license (JA. 884). Disregarding applications involving changes of facilities within a community and AM-FM combinations, which the FCC now expressly permits, only 5 applications out of a total of 654 involved media-affiliated applicants. *Id.*

[17] Newspapers were sellers of broadcast interests in 35 applications for transfer and were buyers in only two (JA. 885, 886). Both newspaper buyers were seeking to purchase AM stations—none sought to purchase television stations (JA. 886). Television-affiliated licensees were sellers in 19 transfer applications, and not a single television-affiliated licensee was a buyer (JA. 885, 886). Disregarding AM-FM combinations and exchanges of similar facilities within a community, out of a total of 1,062 transfer applications during the period studied, only a single one involved the acquisition of a broadcast license by an applicant with other media affiliations in the community. That single exception was a newspaper-affiliated applicant which sought to acquire an AM station (JA. 886).

the FCC exceeded its constitutional and statutory authority in adopting its challenged regulations, and to reverse the Court of Appeals affirmance of those regulations.

Alternatively, NAB respectfully requests this Court to hold that the grandfather provision in those regulations was reasonably adopted, and to reverse the Court of Appeals action vacating that provision.

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